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No. 09-____

In the
Supreme Court of the United States

ANTHONY D. EDWARDS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a *Miranda* warning administered prior to an initial interrogation may be presumed to remain effective with respect to subsequent interrogations?

2. What factors should courts consider in determining the continuing effectiveness of an initial *Miranda* warning with respect to subsequent interrogations?

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No. 09-___

In the
Supreme Court of the United States

ANTHONY D. EDWARDS,

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v.

UNITED STATES,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew D. Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

The decision of the Seventh Circuit here chips away at the longstanding obligation of the police to inform suspects of their constitutional rights to silence and to counsel prior to custodial interrogation. This Court has held that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). Yet in this case the Seventh Circuit has concluded that a *Miranda* warning administered prior to an initial interrogation may simply be "presumed" to remain effective with respect to subsequent interrogations. The Seventh Circuit's "presumption" improperly shifts the burden of proving the effectiveness of a *Miranda* warning from the government to the defendant in direct conflict with *Miranda* and its progeny. This case therefore presents an opportunity for the Court to reinforce *Miranda*'s placement of the burden of proof.

This case also affords an opportunity for this Court to articulate the factors courts should consider in determining the effectiveness of an initial *Miranda* warning in multiple interrogation cases. In *Wyrick v. Fields*, 459 U.S. 42, 48 (1982) (per curiam), the Court concluded that new *Miranda* warnings were not necessary after the defendant had signed a waiver form prior to a polygraph examination because it determined that the examination and the post-test questioning were essentially the "same interrogation," and so had no reason to articulate the factors to be considered in multiple interrogation

cases where there is a clear break between interrogations. The lower federal courts and state courts have reached conflicting decisions on this issue. A number of courts have concluded that the time lapse alone between the initial *Miranda* warning and the subsequent interrogation is virtually dispositive of the continuing effectiveness of the warning. Other courts, however, have articulated a number of additional factors that are likewise relevant to the continuing-effectiveness determination. The Court's guidance on this recurring issue would clarify the circumstances where re-administration of the *Miranda* warnings is necessary.

Accordingly, petitioner respectfully requests that the Court grant the petition.

OPINIONS BELOW

The Seventh Circuit's decision is reported at 581 F.3d 604 (7th Cir. 2009) and reprinted in the Appendix at 1a. The judgment of the district court is unreported and reprinted in the Appendix at 18a. The opinion and order of the district court denying petitioner's motion to suppress is likewise unreported and reprinted in the Appendix at 33a.

JURISDICTION

The Court of Appeals issued its decision on September 14, 2009. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the United States Constitution provides in pertinent part that "no person shall . . . be compelled in any criminal case to be a witness against himself."

The Sixth Amendment of the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Anthony D. Edwards was convicted after a three-day jury trial on one count of possession with intent to distribute five grams or more of crack cocaine under 21 U.S.C. § 841(a)(1).

A. Factual Background

On July 13, 2006, David Beagle was arrested at his home in Hammond, Indiana, after selling cocaine to a cooperating witness for the government on multiple occasions. Mr. Beagle, a regular user and street-level dealer of crack cocaine and other drugs, cooperated with the government following his arrest, agreeing to set up a controlled buy.

Later that same day, Mr. Beagle placed a call to a man known to him as "Willie" to arrange a purchase of crack cocaine. About an hour after the call, a Cadillac arrived in the alley behind Mr. Beagle's house, and Mr. Beagle received a call from "Willie"

notifying him that he had arrived. When Mr. Beagle failed to appear in the alley, the Cadillac began to pull away. At this point, an unmarked police car stopped the Cadillac, and officers arrested its occupants, including the defendant.

The arresting officer testified at trial that he saw a small plastic bag containing an off-white substance fall from the defendant to the ground during an initial pat-down search of the defendant, and that he found two more plastic bags containing an off-white substance at the defendant's feet when he was later transferred from one police car to another. The DEA laboratory determined that the contents of all three bags contained cocaine base. No fingerprint testing was conducted on the bags. The defendant denied that he has possessed any drugs and testified that he did not see the officer find any drugs.

Mr. Edwards was taken to the Hammond Police Department and placed in a holding cell. Shortly thereafter, he was taken to an interview room where he was asked a series of booking questions by Agents Melvin Mansfield and Kelly Carroll. The agents presented Mr. Edwards with a waiver form listing his *Miranda* rights at the top and including a waiver provision and a signature line at the bottom. Agent Carroll read each right and the waiver provision to Mr. Edwards. Agent Carroll instructed Mr. Edwards to initial each right and the waiver provision to indicate his understanding of those rights and the waiver, and Mr. Edwards complied. Agent Carroll then instructed Mr. Edwards to sign his name on the signature line to indicate a waiver

of his *Miranda* rights, and Mr. Edwards again complied.

Mr. Edwards later testified that did not understand that he was waiving his *Miranda* rights and that he "was just doing what [he] was asked to do." Neither Agent Carroll nor Agent Mansfield completed the DEA-6 form routinely used to document interrogations, nor took any notes on the interrogation after the completion of the booking process. After Mr. Edwards signed the waiver form, the agents asked him questions about the events of that day, and he made no inculpatory statements. Believing that the defendant was being "untruthful," the agents ended the interrogation and returned Mr. Edwards to the holding cell.

Approximately thirty to forty minutes later, two different officers--Agents Jeff Trevino and Nikolaos Zairis--brought Mr. Edwards back to the interview room for a second interrogation. Neither agent read Mr. Edwards his *Miranda* rights; rather, Agent Trevino simply showed Mr. Edwards the waiver form he had signed previously and asked if he understood his rights, and Mr. Edwards said that he did. Mr. Edwards was not asked to sign a new waiver form, nor was he asked to re-initial or re-sign the existing waiver form. The agents testified at trial that Mr. Edwards admitted during the second interrogation that he had intended to sell crack cocaine to the government informant that day and that he had possessed the crack cocaine found during the arrest. However, the agents did not take a video or audio recording of the interrogation nor

asked Mr. Edwards to sign a written statement. Mr. Edwards denied making those statements.

B. Trial, Sentencing and Appeal

Prior to trial, the district court held an evidentiary hearing on the defendant's motion to suppress his statements from the second interrogation. The government presented testimony from Agent Mansfield, who had participated in the first interrogation, and Agent Trevino, who had participated in the second interrogation. Mr. Edwards testified on his own behalf.

The court denied his motion, concluding that he had sufficiently waived his *Miranda* rights prior to the second interrogation because he "signed and initialed a written consent from waiving his *Miranda* rights" prior to the first interrogation. App. 47a. Although the court noted that the new officer conducting the second interrogation "did not review the waiver form again but rather simply showed the form to Defendant and asked him whether he remembered and understood the rights that had been read to him" before the first interrogation, and that Mr. Edwards has simply "answered yes," the court concluded that "[n]othing more is needed." *Id.*

The district court presided over a three-day jury trial. The government presented testimony from its informant, the officers involved in the investigation of the case, a forensic chemist, a telephone records keeper, and an expert in street-level narcotics trafficking. Among other things, the interrogating officers testified regarding the defendant's

incriminating statements from the second interrogation. Mr. Edwards testified on his own behalf.

The jury subsequently convicted Mr. Edwards, and the district court sentenced him to 108 months imprisonment.

On appeal, the Seventh Circuit affirmed the admission into evidence of the defendant's statements from the second interrogation. The Court of Appeals concluded that because the defendant had waived his *Miranda* rights prior to the first interrogation, "the presumption should be that he would remember [his *Miranda* rights] even if some time had elapsed between his receiving the warnings and undergoing the questioning that elicited the inculpatory statement" in the second interrogation. App. 5a. The Court of Appeals further concluded that "[t]he presumption can be rebutted but was not in this case." *Id.* The Seventh Circuit declined to "attach dispositive weight to a break in questioning, even when the break is protracted and other circumstances might have made it less likely that the defendant would remember that he could stop the questioning at any time." *Id.*

Consequently, the Court of Appeals upheld the defendant's conviction, but vacated the sentence on other grounds and remanded for further proceedings.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's "Presumption" That An Initial *Miranda* Warning Remains Effective Throughout The Course Of Multiple Interrogations Conflicts With This Court's Decision In *Miranda* That The Burden Rests With The Government To Prove The Effectiveness Of The Warnings.

This case provides the Court with an opportunity to correct the Seventh Circuit's reading of a landmark case and to reinforce the burden on the government to obtain voluntary, knowing, and intelligent waivers of suspects' Fifth and Sixth Amendment rights prior to custodial interrogation.

The Seventh Circuit's decision here establishes a "presumption" that a *Miranda* warning administered prior to an initial interrogation remains effective with respect to all subsequent interrogations. The Court of Appeals concluded: "The *Miranda* form told him that he had that right, and the presumption should be that he would remember this even if some time had elapsed between his receiving the warnings and undergoing the questioning that elicited the inculpatory statement." App. 5a. The burden then shifts to the defendant to "rebut" that presumption. *Id.*

The Seventh Circuit's "presumption" of the continuing effectiveness of a *Miranda* warning directly conflicts with *Miranda* and subsequent decisions by this Court. In *Miranda*, this Court established the opposite presumption: "In dealing

with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded . . . ." *Miranda v. Arizona*, 384 U.S. 436, 498 (1966). *See also United States v. Patane*, 542 U.S. 630, 638 (2004) ("the *Miranda* rules creates a presumption of coercion"); *Oregon v. Elstad*, 470 U.S. 298, 310 (1985) ("courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised"); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) ("The courts must presume that a defendant did not waive his rights, the prosecution's burden is great."); *Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("courts indulge in every presumption against waiver"); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights"). Contrary to this Court's decisions, the Seventh Circuit has reversed the *Miranda* presumption in multiple interrogation cases.

The Seventh Circuit's "presumption" also conflicts with *Miranda*'s placement of the burden of proof: "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475. *See also Missouri v. Seibert*, 542 U.S. 600, 610 n.1 (2004) (plurality) ("The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver."). The Seventh Circuit's "presumption," however, shifts the "placement of that burden,"

telling the court that it "*must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979). *See also Heiner v. Donnan*, 285 U.S. 312, 329 (1932) ("A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof.").

The Seventh Circuit's burden-shifting ignores the principles announced in *Miranda* that mandate placement of the burden on the government. "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Miranda*, 384 U.S. at 475. An initial administration of *Miranda* rights does nothing to change these conditions. The government is still responsible for the "isolated circumstances in which the interrogation takes place" and still controls "the only means of making available corroborated evidence of warnings." So the burden should continue to rest with the government throughout the course of multiple interrogations. *See Davis v. United States*, 512 U.S. 452, 470-71 (1994) (Souter, J., concurring) ("Nor may the standard governing waivers . . . be deflected away by drawing a distinction between initial waivers of *Miranda* rights and subsequent decisions to reinvoke them, on the theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect

shoulder a burden of showing a clear subsequent assertion. *Miranda* itself discredited the legitimacy of any such distinction.").

Accordingly, the Court should grant this petition and make clear that an initial *Miranda* warning should not be presumed to remain effective over the course of multiple interrogations, that defendants should not be made to bear the burden of disproving an initial warning's effectiveness; and that the burden should appropriately be borne by the government throughout.

II. The Lower Courts Require Guidance Regarding The Determination Whether *Miranda* Warnings Must Be Re-Administered In Multiple Interrogation Cases.

In addition to affording the Court an opportunity to correct an incipient erosion of *Miranda*, this case also presents an opportunity for this Court to clarify the factors that lower courts should consider in determining the effectiveness of initial *Miranda* warnings in multiple interrogation cases.

In *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam), this Court considered whether, after the defendant had signed a consent form waiving his *Miranda* rights prior to undergoing a polygraph examination, new *Miranda* warnings were required before he was subsequently questioned regarding the results of that examination. There, the Court concluded that any need for a new set of warning was "unreasonable" because the polygraph examination and the post-test questioning were essentially the

"same interrogation." *Id.* at 48. The Court therefore had no reason to articulate the factors to be considered in multiple interrogation cases, like the one here, where there is a clear break between interrogations. *See United States v. Rodriguez-Preciado*, 399 F.2d 1118, 1130 (9th Cir. 2005) (recognizing that this Court has "had no occasion to address the question . . . whether *Miranda* warnings, once given, need to be re-administered due to changed circumstances").

Absent guidance from this Court, the lower federal courts and state courts have reached conflicting decisions in such cases. Here, the Seventh Circuit recognized that the "practical question" is "whether the defendant when he gave the statement didn't realize he had a right to remain silent." App. 5a. But, as part of its "presumption" analysis, the Court of Appeals concluded that the amount of time elapsed between the administration of the initial *Miranda* warnings and the second interrogation was essentially the determinative factor. *Id.* ("The cases do not speak in terms of a presumption but that is the practical effect of their reluctance to attach dispositive weight to a break in questioning, even when the break is protracted and other circumstances might have made it less likely that the defendant would remember that he could stop the questioning at any time."). *See also Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir. 1992); *United States v. Diaz*, 814 F.2d 454, 461 n.6 (7th Cir. 1987); *United States ex rel. Patton v. Thieret*, 791 F.2d 543, 547 (7th Cir. 1986); *United States ex rel. Henne v. Fike*, 563 F.2d 809, 814 (7th Cir. 1977). A number of other federal circuits have similarly concluded that

the time lapse alone is virtually dispositive of the continuing effectiveness of a *Miranda* warning. *See, e.g., Guam v. Dela Pena*, 72 F.3d 767, 769 (9th Cir. 1995) ("The determinative factor is the lapse of time between . . . when [defendant] was given adequate *Miranda* warnings, and . . . when his questioning resumed."); *United States v. Frankson*, 83 F.3d 79, 83 (4th Cir. 1996); *Ballard v. Johnson*, 821 F.2d 568, 571-72 (11th Cir. 1987); *Evans v. McCotter*, 790 F.2d 1232, 1238 (5th Cir. 1986); *Stumes v. Solem*, 752 F.2d 317, 320 (8th Cir. 1985); *Martin v. Wainwright*, 770 F.2d 918, 930-31 (11th Cir. 1985); *Jarrell v. Balkcom*, 735 F.2d 1242, 1254 (11th Cir. 1984); *Biddy v. Diamond*, 516 F.2d 118, 122 (5th Cir. 1975).

Other courts, however, have articulated a number of additional factors relevant to the determination whether an initial *Miranda* warning remains effective for purposes of later interrogations: (1) the time lapse between the last *Miranda* warnings and the statements; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the statement were made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the statements; (5) whether the statement elicited during the complained-of investigation differed significantly from other statements which had been preceded by *Miranda* warnings; and (6) the apparent intellectual and emotional state of the suspect. *See, e.g., United States v. Pruden*, 398 F.3d 241, 246-47 (3d Cir. 2005); *United States v. Hanton*, 418 F. Supp. 2d 757, 764 (W.D. Pa. 2006); *State v. DeWeese*, 582 S.E.2d

786, 798 (W.Va. 2003); *United States v. Jones*, 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001); *United States v. Vasquez*, 889 F. Supp. 171, 177 (M.D. Pa. 1995); *State v. Tolbert*, 850 A.2d 1192, 1200 (Md. 2004); *Koger v. State*, 17 P.3d 428, 431 (Nev. 2001); *State v. Smith*, 675 A.2d 93, 98 (Me. 1996); *Yung v. State*, 906 P.2d 1028, 1034 (Wyo. 1995); *Commonwealth v. Hughes*, 555 A.2d 1264, 1276 (Pa. 1989); *State v. Roberts*, 513 N.E.2d 720, 726 (Ohio 1987); *State v. McZorn*, 219 S.E.2d 201, 212 (N.C. 1975).

These "objective indicia"--beyond simply the time lapse between the initial warning and the later interrogations--"are significant in determining when an accused must be reinformed of his constitutional rights." *State v. Myers*, 345 A.2d 500, 502 (Me. 1975). They address the question whether the initial *Miranda* warnings remain effective in apprising the defendant that the rights to silence and to counsel can be invoked at any time, despite an earlier written waiver. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) ("the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"); *Pruden*, 398 F.3d at 247 (the "question is whether the passage of time or an intervening event rendered [defendant] unable to effectively waive his *Miranda* rights when he was questioned again"); *Rodriguez-Preciado*, 399 F.3d at 1137 (Berzon, J., dissenting) (courts should "look[] at the various factors from the perspective of the *suspect*, centering on whether he could reasonably believe that the first warning did not still have force--that is, on whether the original warning was still fully

effective"). Breaks in the continuity of an interrogation and a lapse in time between the initial warnings and the subsequent interrogation are equally relevant to answering that question.

The facts of this case indicate that Mr. Edwards did not understand that, after an initial waiver of rights, he nonetheless continued to have the right at any time to stop the questioning or to seek counsel. Unlike in *Wyrick*, there was a clear break in the continuity of the interrogation. The second interrogation was separated from the first interrogation by a half-hour interval in a holding cell, and involved different agents and different questioning,

In addition, the new agents did not read Mr. Edwards his *Miranda* rights again prior to re-questioning, but, by their own account, merely pointed to the waiver form that Mr. Edwards signed in advance of his prior interrogation by other agents and asked whether he understood it. This did not "function 'effectively' as *Miranda* requires." *Seibert*, 542 U.S. at 611-12 (plurality). It did not "effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture." *Id.* at 612. Nor did it "reasonably convey that he could choose to stop talking even if he had talked earlier." *Id.* at 612. *See also Miranda*, 384 U.S. at 444 (recognizing the "continuous opportunity" to exercise the rights to silence and to counsel).

The Court should therefore grant this petition and clarify the factors governing the continuing

effectiveness of an initial *Miranda* warning over the course of subsequent interrogations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 2009

APPENDIX

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In the

United States Court of Appeals
for the Seventh Circuit

No. 08-1124

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY D. EDWARDS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.
No. 2:06 CR 116-Phillip P. Simon, *Judge.*

Argued May 6, 2009-*Decided* September 14, 2009

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges.*

POSNER, *Circuit Judge.* The defendant was convicted by a jury of distributing 5 grams or more of crack and was sentenced to 108 months in prison. His appeal raises several issues.

After being arrested and jailed, he was given the *Miranda* warnings, and after agreeing to waive his

Miranda rights was questioned for a quarter of an hour or so and then returned to his cell. Thirty to forty minutes after the waiver—which is to say roughly fifteen to twenty-five minutes after the completion of the questioning—he was returned to the interview room for further questioning by another agent. Before beginning, the agent showed the defendant the waiver form he had signed before the first round of questioning and asked him whether he understood his rights, and he replied that he did. The form made clear that he could stop the questioning at any time. But he argues that the admissions he made during the second round of questioning should not have been placed in evidence at the trial because the *Miranda* warnings had not been recited to him before the second round began.

The defendant asks us to adopt a doctrine of "staleness" that would require readministering the *Miranda* warnings after any break in an interrogation—even, as in this case, a very short one—if there is any reason to think that the person questioned may have forgotten or misunderstood the warnings or thought they had lapsed or been unable to claim them because of new pressures brought to bear on him after the break, though if his statement was coerced this would be an independent ground for suppression—coerced confessions were inadmissible long before the *Miranda* case. The defendant points out that the second interrogation was conducted by different officers from the first one and that he made inculpatory statements only at the second one. And he argues that he was in a frightened, emotional state throughout the entire period of the interrogations.

The form that he was read, and signed, included the statement that "if you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the

right to stop answering at any time until you talk to a lawyer." So if the defendant had not wanted to be questioned the second time, he had only to refuse. Of course during the 30 or 40 minutes that elapsed between his signing the waiver form and the second interrogation, he might have forgotten that he had the right to clam up even though he had answered questions at the first one. But he might, for that matter, have forgotten that he had that right if the questioning had lasted for 30 or 40 minutes after he was informed of his rights. The logic of his argument is that the *Miranda* warnings should be repeated periodically in the course of protracted questioning. But such reiteration would convey to the defendant a suggestion that he not waive his *Miranda* rights; it would be like saying "Are you *really* sure you want the questioning to continue?"

The cases do not require that the warnings be repeated after an interruption in the questioning, e.g., *United States ex rel. Patton v. Thieret,* 791 F.2d 543, 547-48 (7th Cir. 1986); *United States v. Ferrer-Montoya,* 483 F.3d 565, 569 (8th Cir. 2007) (per curiam); *United States v. Rodriguez-Preciado,* 399 F.3d 1118, 1128-29 (9th Cir. 2005); see also *Wyrick v. Fields,* 459 U.S. 42, 48-49 (1982) (per curiam), even if the interruption is much longer than it was in this case. See, e.g., *United States v. Diaz,* 814 F.2d 454, 460 and n. 6 (7th Cir. 1987) (several hours); *United States ex rel. Henne v. Fike,* 563 F.2d 809, 813-14 (7th Cir. 1977) (per curiam) (nine hours); *People v. Dela Pena,* 72 F.3d 767, 769-70 (9th Cir. 1995) (nearly fifteen hours); *Stumes v. Solem,* 752 F.2d 317, 320 (8th Cir. 1985) (nearly five hours); *Jarrell v. Balkcom,* 735 F.2d 1242, 1253-54 (11th Cir. 1984) (three hours). In *Thieret* the suspect was placed in a holding cell between the warnings and the defendant's waiver of his *Miranda* rights. In *Diaz* the

warnings were given at the hotel where the suspect was arrested and his inculpatory statements came during the subsequent booking. In *Fike* the warnings were given in the evening and the statements the following morning, and the warnings and the interrogation were by different officers, as they were in *Jarrell* and in the present case. In *United States v. Pruden,* 398 F.3d 241, 247-48 (3d Cir. 2005), roughly 20 hours and a change of location intervened between warnings and statement and the defendant was merely reminded before he made the statement that he had received the warnings the previous afternoon. The defendant points to a pair of state court cases and one district court case as contradicting the decisions we have cited, but the intervals in those cases were much longer than in the present case. *Commonwealth v. Wideman,* 334 A.2d 594, 598-99 (Pa. 1975) (12 hours); *Commonwealth v. Riggins,* 304 A.2d 473, 477-78 (Pa. 1973) (17 hours); *United States v Jones,* 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001) (18 hours).

Vagueness is the bane of legal reasoning. This case presents several examples, beginning with "staleness," a word with no proper application to a statement. What is a "stale statement"? Interrogators might try to negate the *Miranda* warnings; had the second interrogator in this case told the defendant that he must answer his questions because a *Miranda* waiver is forever the answers could not have been used in evidence. See *Hart v. Attorney General,* 323 F.3d 884, 894-95 (11th Cir. 2003); *United States v. Beale,* 921 F.2d 1412, 1435 (11th Cir. 1991); *United States v. San Juan-Cruz,* 314 F.3d 384, 387-89 (9th Cir. 2002). And likewise if, as in *Ex parte J.D.H.,* 797 So. 2d 1130 (Ala. 2001), so much time had elapsed between the rounds of questioning—16 *days* in that case—that the agent should have realized that the defendant might well have forgotten the warnings, and specifically the

paragraph tucked into the *Miranda* form that entitles a suspect to interrupt the questioning at any time and summon a lawyer. Yet even in *J.D.H.* the court emphasized circumstances beyond the long delay between interrogations in deciding that the inculpatory statement should have been suppressed.

The practical question is not whether *Miranda* warnings given to a defendant became "stale," or, though the courts love the phrase, whether the "totality of the circumstances" indicates that the inculpatory statement was made knowingly. It is whether the defendant when he gave the statement didn't realize he had a right to remain silent. The *Miranda* form told him he had that right, and the presumption should be that he would remember this even if some time had elapsed between his receiving the warnings and undergoing the questioning that elicited the inculpatory statement. The cases do not speak in terms of a presumption but that is the practical effect of their reluctance to attach dispositive weight to a break in questioning, even when the break is protracted and other circumstances might have made it less likely that the defendant would remember that he could stop the questioning at any time. The presumption can be rebutted but was not in this case.

The defendant makes the unrelated argument that evidence of prior criminal activity by him should not have been admissible at the trial. Rule 404(b) of the evidence rules forbids the use of such evidence to establish a person's propensity to commit crimes but permits it "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The government's principal witness was a drug dealer named Beagle who testified that, working as a government informant, he had arranged to make a

controlled purchase of drugs from the defendant. There was conflicting testimony about whether the defendant had drugs with him when arrested upon arriving at Beagle's house, where the purchase was to take place. But Beagle testified in detail about the procedures used when the defendant had sold drugs to him on previous occasions—how the sale would be set up, where it would take place, and so forth—and that he had followed the same procedures in the transaction for which the defendant was being prosecuted, though the defendant was arrested before the sale took place. The earlier sales were of course criminal too, but they were not charged in the present case.

The parties duel over whether the evidence of these sales was nevertheless admissible under the "intricately related" or "inextricably intertwined" gloss on Rule 404(b), despite our criticism of these tongue-twisting formulas in *United States v. Taylor*, 522 F.3d 731 (7th Cir. 2008). The rule lists purposes for which evidence of prior crimes may be presented, but the list is illustrative rather than exhaustive because the rule forbids only the use of prior-crimes evidence to show that since the defendant committed crimes in the past, probably he committed the crime of which he is now accused, or that since he's a criminal the jury might as well resolve any doubts about his guilt against him. To satisfy Rule 404(b), all the government need show is a purpose other than to establish the defendant's propensity to commit crimes. *Id.* at 735-36. The fact that prior-crimes evidence is "inextricably intertwined" with or "intricately related" to (and are these the same tests or different?—who knows?) the charge in the case at hand is neither here nor there, if indeed any meaning can be assigned to such terms.

Some cases restate the test for admissibility as whether the prior-crimes evidence is needed to

"complete the story" or "tell a complete story" of the crime with which the defendant is charged, e.g., *United States v. Gilmer,* 534 F.3d 696, 705 (7th Cir. 2008); *United States v. Ramirez,* 45 F.3d 1096, 1102 (7th Cir. 1995); *United States v. Quinones,* 511 F.3d 289, 309 (2d Cir. 2007), or to fill a "conceptual void." E.g., *United States v. Gilmer, supra,* 534 F.3d at 705; *United States v. Wantuch,* 525 F.3d 505, 517 (7th Cir. 2008); *United States v. Gougis,* 432 F.3d 735, 742 (7th Cir. 2005). But these formulas, too, lack clarity. We recall Holmes's admonition to think things not words, by which he meant that the words judges use to state a legal doctrine should be transparent to the goals or policies or concerns that animate the doctrine. So in this case the focus of inquiry should be on whether the prior-crimes evidence is relevant (other than to show propensity, which may be relevant to guilt, but is impermissible as evidence) to an issue in the case, and, if so, whether the probative weight of the evidence is nevertheless substantially outweighed by its prejudicial effect or by its propensity to confuse or mislead the jury. Fed. R. Evid. 403; see *Old Chief v. United States,* 519 U.S. 172, 182 (1997); *United States v. Dunkin,* 438 F.3d 778, 780 (7th Cir. 2006); Advisory Committee Note to 1972 Proposed Rules, Rule 404(b).

So did Beagle's previous drug purchases from the defendant bolster the government's case that it had arrested the defendant in the course of a drug sale? They did. There was disagreement over whether the defendant had had drugs in his possession when he was arrested. The previous purchases substantiated Beagle's testimony that he had arranged the meeting with the defendant to buy drugs from him. His past transactions with the defendant had followed a familiar pattern: He would call the defendant to set up the meeting. The defendant would usually be late, prompting a second phone call by Beagle. The

defendant would park in the alley behind Beagle's house, and if Beagle didn't approach the car immediately upon his arrival the defendant would drive away and Beagle would have to call the defendant on the latter's cell phone to summon him back. When the defendant returned, he would give Beagle the drugs. This scenario unfolded as usual in the run up to the defendant's arrest except for Beagle's not coming out of his house to take possession of the drugs; the defendant was arrested before that final step.

All prior-crimes evidence is prejudicial; otherwise there would be no need for Rule 404(b). But the judge did not abuse his discretion in ruling that the admission of the evidence in this case passed muster, for without it the jury might have thought that Beagle had fabricated a planned drug sale in order to curry favor with the government.

Another unfortunate bit of legal jargon has insinuated itself into the appeal. The defendant accuses the government of having "vouched for" the truthfulness of two of its witnesses—Beagle and an officer who testified that he saw a bag containing an off-white rock-like substance fly off the defendant's person during the arrest and that when the defendant was later removed from the police car the officer saw additional bags containing a similar-looking substance lying at the defendant's feet. The prosecutor in his closing argument asked the jury rhetorically "what possible reason does he [the officer] have to risk his career?" by testifying falsely. And he asked Beagle on direct examination what would happen to his plea agreement if he didn't testify truthfully and he replied that "they could throw it out," in which event he would "be looking at more time" in prison.

What "vouching for" means in this context is telling or hinting to the jury that the prosecutor has reasons unknown to it for believing that a government witness is telling the truth. E.g., *United States v. Young,* 470 U.S. 1, 1819 (1985); *United States v. Morris,* 498 F.3d 634, 642 (7th Cir. 2007); *United States v. Brown,* 508 F.3d 1066, 1075-76 (D.C. Cir. 2007). A number of cases suggest that there is another form of vouching as well—the prosecutor's expressing his personal belief in the witness's truthfulness, thus "plac[ing] the prestige of the government behind the witness." E.g., *United States v. Anderson,* 303 F.3d 847, 855 (7th Cir. 2002). It is unclear how different that is from the first form of vouching. The jurors know that the prosecutor wants a conviction; otherwise the charges would have been dismissed. Unless jurors revere prosecutors, the only reason for a juror to accept the prosecutor's expression of a personal belief in the witness's truthfulness is that the juror thinks the belief is based on something the prosecutor knows and the jurors do not—there is no improper "vouching" if the prosecutor merely reminds the jury of evidence presented at the trial that tends to show that a witness was telling the truth. Improper vouching is trying to bolster a witness's believability with "evidence" that was not presented and may well not exist.

The question the prosecutor asked Beagle about the possible consequences of his lying was innocent. It merely probed Beagle's understanding of the consequences of lying on the stand. The prosecutor was not implying that he had secret information that Beagle would have been afraid to lie because of the consequences if he did. The case law allows the government to present evidence that plea deals are conditioned on truthful testimony. E.g., *United States v. Morris, supra,* 498 F.3d at 642-43; *United States v. Renteria,* 106 F.3d 765, 767 (7th Cir. 1997); *United*

States v. Hansen, 434 F.3d 92, 101 (1st Cir. 2006). One case breaks from this pattern, *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007), but the other cases on which the defendant relies are distinguishable from the present one because in them the prosecutor went beyond just asking the defendant what he thought the consequences of lying would be. See *United States v. Carroll*, 26 F.3d 1380, 1389 (6th Cir. 1994); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992); *United States v. Francis*, 170 F.3d 546, 550-51 (6th Cir. 1999).

The prosecutor's rhetorical question about the agent's jeopardizing his career by lying about the drugs he found in order to frame the defendant presents a more difficult issue. It *could* be thought just an appeal to the jurors' common sense. Jurors know that a witness takes an oath to tell the truth, and they doubtless have heard of the crime of perjury, so they might wonder on their own what motive a police officer would have for lying under oath, since it could get him into trouble. But when the prosecutor explicitly invites such a speculation, jurors may infer that the government fires officers who lie under oath (even though they are lying to help the government's case), or prosecutes them, so that an officer who lies is indeed jeopardizing his career or his liberty even if he thinks he is helping the prosecution—and no evidence to that effect was presented.

We do not want to encourage lawyers to bring in a parade of witnesses to testify to how often police officers lose social or professional standing because of dishonest testimony. Were such evidence required, testimony that Beagle stood to lose the benefit of his plea bargain could also be thought impermissible vouching because no evidence was presented on how frequently plea bargains are renegotiated or withdrawn

after the government's informant testifies. An entire category of argument—that the jury should ask what a witness can lose by lying, and should believe those witnesses with a lot to lose and disbelieve those (such as defendants) who can get off the hook by perjury—might be ruled out. For there is never evidence about how often these gains and losses occur and whether this understanding of human motivation is supported by social-science research.

Still, there is a difference between the two questions—the actual to Beagle and the rhetorical to the officer. The question put to Beagle was merely intended to elicit the fact that his plea agreement had been conditioned on his testifying truthfully. Not even a glancing reference was made to the probability that Beagle would be punished if he lied; an estimate of that probability was left to the common sense of the jury. The question about the officer—a question put not to him but to the jury and unmistakably rhetorical in character (the jury was not being invited to answer it)—"what possible reason does he have to risk his career?"—implied that the prosecutor had an undisclosed reason to believe that the consequences if the officer lied would be sufficiently grave to guarantee that he would testify truthfully.

Perhaps impelled by cases like *United States v. Johnson-Dix*, 54 F.3d 1295, 1304-05 (7th Cir. 1995); *United States* v. *Badger*, 983 F.2d 1443, 1451 (7th Cir. 1993), and *United States v. Boyd*, 54 F.3d 868, 871-72 (D.C. Cir. 1995), which disapprove of comments that make such an insinuation, the government confesses that the prosecutor's comment about the officer's motives was improper, but points out that it was harmless. The critical evidence of the defendant's having drugs with him in his encounter with Beagle was the latter's testimony. It is true that Beagle,

huddled in his basement while the defendant was being arrested, did not see the drugs. But his testimony that he had arranged to buy drugs from the defendant was strongly supported not only by his testimony about his previous dealing with the defendant but also by records of more than a hundred phone calls from Beagle's home telephone to the defendant's cell phone and the defendant's confession at the police station, which he now denies having made, that it was indeed a drug deal that the police interrupted.

The last issue concerns the sentence. When arrested, the defendant had $765 in cash on his person. The judge inferred that he had received the money in a previous sale of crack cocaine. On this assumption, the judge had solid grounds for adding 12.75 grams to the amount of crack that other evidence (including evidence of 10 grams in prior sales to Beagle) showed that the defendant either had sold or had possessed with intent to sell. The result of the addition (since the supposed earlier sale was, if it really took place, "relevant conduct" within the meaning of the sentencing guidelines) was a higher guidelines sentencing range (108 to 135 months).

The defendant testified that he had received the money from the sale of a minivan. But he also testified that the minivan had no license plates, that title had never been transferred to him, and that the vehicle had never been registered in his name; and this made it impossible to verify his having sold, or for that matter ever owned or possessed, a minivan. And so the prosecutor asked the judge to disbelieve the defendant's story, and the judge obliged

That was fine, as far as it went. But the defendant argues that even if his testimony was false, the prosecution should have been required to present

evidence of what the true source of the money was. We think that's true in this case, though not because it is always improper to satisfy a burden of proof by discrediting an opposing party's evidence. Suppose it were certain that the $765 was the proceeds of the sale either of a Luna moth or of a minivan. If the seller testified that it was a minivan, and his testimony was discredited, the trier of fact could infer that the object that had been sold was the moth, for there would be no alternative hypothesis. *United States v. Hyde*, 448 F.2d 815, 831-32 (5th Cir. 1971), discussed a situation in which it was known that one of two criminal defendants was guilty of a crime, so proof of one defendant's guilt exonerated the other. And *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003), allowed evidence of "differential diagnosis," a technique for identifying the cause of a medical problem by eliminating all the alternative possible causes.

The falsity of the defendant's testimony makes reasonably clear that the $765 was proceeds of an illegal transaction of some sort, but does not show that it was proceeds from selling crack. For all one knows, the defendant sold other illegal drugs (he had been convicted in the past of possession of marijuana) or other contraband, such as guns, but did not want to acknowledge other illegal behavior, which he might have thought would get him into even worse trouble than he was in.

In this case as generally, the fact that a witness lies about one thing doesn't automatically invalidate all his testimony. E.g., *United States v. Reed*, 297 F.3d 787, 789 (8th Cir. 2002); *United States v. Urban*, 404 F.3d 754, 782 (3d Cir. 2005); *Janigan v. Taylor*, 344 F.2d 781, 784 (1st Cir. 1965). The maxim *falsus in uno, falsus in omnibus* is no longer followed, when understood as a rule that a trier of fact may or must

disbelieve the entirety of a witness's testimony if he disbelieves any part of it. *Kadia v. Gonzales,* 501 F.3d 817, 821 (7th Cir. 2007); *Allen v. Chicago Transit Authority,* 317 F.3d 696, 703 (7th Cir. 2003); *Piraino v. International Orientation Resources, Inc.,* 137 F.3d 987, 991 n. 2 (7th Cir. 1998); *Lambert v. Blackwell,* 387 F.3d 210, 256 (3d Cir. 2004); *United States v. Weinstein,* 452 F.2d 704, 713-14 (2d Cir. 1971). As we explained in the *Kadia* case, "anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment." 501 F.3d at 821.

Rather, the trier of fact must consider whether, as in *United States v. Connolly,* 504 F.3d 206, 215-16 (1st Cir. 2007), particular falsehoods in a witness's testimony so undermine his credibility as to warrant disbelieving the rest of his testimony—or a critical part, such as, in the present case, the defendant's denial that the cash found on him when he was arrested was the proceeds of a sale of crack. It thus is only the *automatic* inference from disbelief in one part of a witness's testimony to disbelief in the rest that the modern cases reject, with the occasional exception, such as *United States v. Jackson,* 3 F.3d 506, 510-11 (1st Cir. 1993), which upheld the district judge's inferring that cash was proceeds of a sale of cocaine because he disbelieved evidence that it had a legal source. But *Jackson* is inconsistent with *United States v. Sandridge,* 385 F.3d 1032, 1037-38 (6th Cir. 2004), which rejected this form of automatic inference.

The district judge gave no reason for his belief that the $765 had to be proceeds of selling crack. It's not as if $765 were the "list price" of some standard quantity of crack. There was no evidence of that. Neither, as in

United States v. Sepulveda, 102 F.3d 1313, 1317-19 (1st Cir. 1996), were marked bills from a known drug transaction found. Nor, as in *United States v. Keszthelyi*, 308 F.3d 557, 577-78 (6th Cir. 2002), was the amount of money found so great that, given the defendant's financial circumstances, it could have derived only from selling crack.

There is a further problem. The $765 may have been money that the defendant had been paid by Beagle for previous sales, in which event there was double counting, because the entire estimated quantity of the crack that he had sold Beagle previously was separately counted in figuring his sentence (the 10 grams we mentioned). The government argues that since Beagle had dealt with the defendant for only five months, but the defendant admitted having dealt crack for at least eight months, his "history of selling crack cocaine includes at least *three months* without any sales to Beagle—thus ensuring that the $765 did not represent the proceeds of crack sales to Beagle" (emphasis in original). But $765 in cash is unlikely to have been sitting in the defendant's pocket for months on end.

Now that the sentencing guidelines are advisory rather than mandatory, the judge might have given the defendant the same sentence irrespective of the source of the $765. The judge knew that the defendant had been a dealer for at least eight months, that he had customers other than Beagle, and that only the quantities sold to Beagle had been accounted for. Because "in arriving at its factual findings, the district court may rely on any evidence bearing sufficient indicia of reliability," *United States v. James*, 487 F.3d 518, 529 (7th Cir. 2007), he could infer that the defendant's sales to those customers during that period had amounted to at least 12.75 grams. And when the

defendant was arrested, he had 17 grams with him. Although this was the quantity Beagle had ordered, it greatly exceeded the usual quantity he would sell to Beagle. But it shows that the defendant had access to considerable quantities of crack, and if anything it is unlikely that he would have sold a total of only 12.75 grams to multiple customers over a three-month period.

So the judge could have assumed that the 12.75 grams derived from earlier sales of crack, without basing the assumption on the $765; and even if he had excluded 12.75 grams in calculating the guidelines sentencing range, he might have decided to sentence the defendant as severely as he did. So if we were certain or nearly so that the judge would not have imposed a lower sentence even if he had drawn no inference from the $765, there would be no point in remanding the case for a new sentencing hearing. But we lack that confidence. The judge must have thought the 12.75 grams material; why else say as he did that he was crediting the presentence investigation report's calculation? And he derived the figure from the $765. Without that quantity of grams as relevant conduct, the defendant's sentencing range would have dropped to 87 to 108 months, though this assumes that the judge in figuring the sentence used the estimate of drug quantity in the presentence investigation report (39.75 grams, which included the 12.75 grams in question).

Although the judge said that he "could easily and conservatively estimate that the amount of crack was between 35 and 50 grams," the sentence that he imposed—a sentence at the very bottom of what he thought the guidelines sentencing range was—suggests that he thought the lower end of the 35- to 50-gram range a better estimate of the quantity of crack sold by

the defendant. His decision to impose the minimum guidelines sentence suggests a lean toward lenity, making it difficult to predict the outcome of a new sentencing hearing. In *Gall v. United States*, 128 S. Ct. 586, 597 (2007), the Supreme Court instructed that in reviewing a sentence the court of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." We cannot be confident that the judge did not commit a significant error of that kind. We therefore order the sentence vacated and the case returned to the district court for a further sentencing hearing. The conviction, however, is affirmed.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED.

United States District Court

NORTHERN District of INDIANA

UNITED STATES OF AMERICA

v.

ANTHONY DUPREE EDWARDS

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:06 CR 116 PS

USM Number: 08868-027

Andrea E. Gambino
Defendant's Attorney

THE DEFENDANT.

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- X was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(l)	Distribution of 5 gram or more of Cocaine Base, Commonly Known as "Crack Cocaine", A Schedule II Controlled Substance	7/13/2006	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ The defendant has been found not guilty on count(s) _____

□ Count(s) ____ □ is □ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 28,2007
Date of Imposition of Judgment

S/Philip P. Simon
Signature of Judge

Philip P. Simon, U.S. District Court Judge
Name and Title of Judge

December 7, 2007
Date

DEFENDANT: ANTHONY DUPREE EDWARDS

CASE NUMBER: 2:06 CR 116 PS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 108 MONTHS

x The court makes the following recommendations to the Bureau of Prisons:

That the defendant be allowed to participate in the 500 hour drug treatment program or the most aggressive drug treatment program available from the BOP.
That the defendant be housed at the Camp Facility at Terre Haute or another BOP facility that is as close to Lake County, Indiana as possible.

x The defendant is remanded to the custody of the United States Marshal.

□ The defendant shall surrender to the United States Marshal for this district:

□ at _____ □ a.m. □ p.m. on _____.

□ as notified by the United States Marshal.

□ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

□ before 2 p.m. on _____

- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANTHONY DUPREE EDWARDS
CASE NUMBER: 2:06 CR 116PS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 48 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

□ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if

□ The defendant shall register with the state sex offender registration agency in the state where the

defendant resides, works, or is a student, as directed by the probation officer. (Check, applicable.)

□ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1 The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4. The defendant shall support the defendant's dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer at least ten (10) days prior to any change of residence or employment.

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8. The defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered, or other places specified by the court.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felon, unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

15. The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

DEFENDANT: ANTHONY DUPREE EDWARDS
CASE NUMBER: 2:06 CR 116 PS

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall participate in a co-payment program to offset the cost of treatment. The co-payment amount is based on annual poverty guidelines established by the U.S. Department of Health and Human Services (HHS) on a sliding scale basis. The co-payment amount shall not exceed an amount determined by the Probation Officer's Sliding Scale For Monthly Co-Payment.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

DEFENDANT: ANTHONY DUPREE EDWARDS
CASE NUMBER: 2:06 CR 116PS

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ NONE	$ NONE

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) payable to Clerk, U.S. District Court, (street address), (city, state, zip) for the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

- ☐ Restitution amount ordered pursuant to plea agreement $ _____
- ☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
  - ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110,110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1991.

DEFENDANT: ANTHONY DUPREE EDWARDS

CASE NUMBER: 2:06 CR 116 PS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 100.00 due immediately, balance due

□ not later than _____ or

□ in accordance □ C, □ D, □ E, or □ F below); or

B □ Payment to begin immediately (may be combined with □ C, □ D, or □ F below); or

C □ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D □ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E □ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court

will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

ANTHONY EDWARDS

2:06-CR-116 PS

OPINION AND ORDER

Following an ınformant's tip, DEA agents arrested Defendant Anthony Edwards for possession of crack cocaine with ıntent to distribute. After he was taken into custody, he waived his *Miranda* rıghts and subsequently gave an ınculpatory statement. Defendant then filed a motıon to quash his arrest, arguing that the officers lacked probable cause. He also sought to suppress his statements, claimıng that they were a product of a coercive environment. The Court held a hearıng on January 9, 2007, and Defendant filed a supplement to his Motion on January 29, 2007. For the following reasons, his Motıon is denied.

I. FACTUAL BACKGROUND

On July 13, 2006, DEA agents took David Beagle — the ınformant at issue ın this case — into custody after he had sold cocaıne several times to their cooperating witness. Beagle informed the agents that he was willing to cooperate and give them his suppliers, and the agents took him up on his offer. To test his reliability and trustworthiness, they questioned him about the previous controlled buys that had taken place in November 2005. Beagle truthfully answered questions about the purchases without knowing that

they were government-arranged buys. Beagle also told the agents about the people who bought his drugs, and gave the agents accurate information about when his drug sales had occurred. Agent Trevino, a detective sergeant with the Gary Police Department assigned as a task force agent with the DEA and a thirteen-year veteran police officer, concluded that Beagle was "forthcoming" and that the information he gave was "right on." (Tr. at 27.)

During Trevino's testimony, defense counsel obtained details regarding a specific controlled purchase from Beagle. During that buy, Beagle had used a pay phone across the street to contact his source. Beagle then went to pick up the cocaine, while the cooperating witness waited at Beagle's house. Beagle returned with powder cocaine and began to cook the powder into crack in front of the cooperating witness. Because it was taking too long to cook, the witness left with some crack cocaine and the rest in a jar.

The agents asked Beagle about his current sources of supply. He agreed to telephone his sources to set up controlled purchases of crack cocaine. He told the agents that it would best to contact the sources from his home as they would expect to see his home number on their caller I.D. Consequently, the agents drove Beagle to his home to make the calls.

Beagle told the agents that one source (and the only one of concern to us) went by the name "Willie." Beagle described him as a heavy-set black man with a dark complexion and short curly hair, and stated that he drove a dark-colored Cadillac. Beagle also said that he sometimes had to call Willie a few times, but that Willie usually brought the drugs within the hour. According to Beagle, it was Willie's habit to park in the

alley behind Beagle's detached garage when delivering the cocaine. Willie would then call, informing Beagle that he was in the alley. If Beagle took some time to come out to the car, Willie would leave the alley and circle the block because he didn't like to stay parked for too long.

Beagle called Willie in the presence of the agents at approximately 4:00 pm. He called from the basement in his home, which did not have a view of the alley. Beagle told Willie that he needed a certain amount of crack. Willie told Beagle that he would arrive at Beagle's house shortly. After waiting 15-20 minutes, Beagle made a follow-up phone call, and Willie stated that he would be there in about 15 minutes.

Consistent with Beagle's prediction, between 4:45 pm and 5:00 pm, a dark-colored Cadillac with two African-American men pulled into the alley. Trevino, who was peering over the fence in Beagle's backyard, did not see the car initially pull into the alley but did see the car pull behind Beagle's garage. At this point, Trevino could see the driver's side of the vehicle, and noted that the driver matched Beagle's description of Willie. Agent Trevino called the agents in Beagle's basement and told them that a car had just pulled behind the garage. The agents in the basement told Trevino that Beagle had just received a phone call from Willie who stated that he was in fact behind Beagle's home.

The Cadillac began to leave the alley after a couple minutes of being parked. A Hammond police car pulled into the alley behind the Cadillac and put on its siren, and the Cadillac eventually stopped. Hammond police then arrested and searched both occupants of the

car sometime between 4:45 and 5:00 pm.[1] The driver was identified as Defendant Edwards.

Defendant, who testified during the motion to suppress hearing, claimed that he didn't own a car at the time of his arrest, but was driving his fiancé's car. She had owned the car for only a couple months. Defendant stated that he and his brother went to Taco Bell and used the drive-thru. As they were getting ready to drive onto the highway, they stopped at an alley to go to the bathroom. Defendant had been a victim of a shooting in his stomach and leg and as a result, often had an urgent need to use the bathroom. Once in the alley, he saw the police car behind him, was pulled from the car by officers with guns drawn, was thrown down on the ground, and was handcuffed. The officers did not inform Defendant why he was arrested or where he was being taken.

Defendant also testified that his cell phone number was different than the one used by Beagle to make the drug purchase. However, a number of cell phones were found in the car. Defendant countered, somewhat incredibly, that these were already in the car when his fiancé bought it.

Defendant was taken to a holding cell at the Hammond Police Department. Meanwhile, DEA Agent Melvin Mansfield went to the Hammond Narcotics Bureau to receive his assignment, which was to begin to interview Defendant with Agent Kelly Carroll. This trip from the place of the arrest to the Bureau took about 10-12 minutes. Mansfield then traveled to the

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[1] Mansfield estimated the time of arrest between 4 30 and 4·45 pm, whereas Trevino placed the time of arrest between 4·45 pm and 5:00 pm

Hammond Police Department, which took approximately five minutes.

Mansfield and Carroll began to question Defendant. They began by asking him standard booking questions such as his name, social security number, and date of birth. He did not give any nicknames, including Willie, when asked. The agents then advised him of his *Miranda* rights. Carroll orally read each *Miranda* right and the waiver in the *Miranda* advisement form to Defendant. After doing so, Carroll placed the form in front of Defendant, and asked Defendant to read and initial each right if he understood it. Defendant initialed each right and also a general statement regarding the waiver of his rights. He printed and signed his name at the bottom of the waiver sheet. When asked if he had any questions, Defendant replied no. Mansfield testified that Defendant was "clear and coherent" when reviewing the waiver form. (Tr. at 14.) The waiver form was signed at 6:36 pm.

According to Defendant, he only glanced at the waiver form and did not read it. He denied that the agents read the form to him. Instead, they told him where to place the initials and sign, and he just did what he was told. He testified that, if he had understood what the waiver form meant, he would not have initialed and signed it.

While Defendant was with the agents, he asked to make a phone call to his family because his family would be concerned about what happened to him and his brother. He was told that he could make the call once the interview was completed. Furthermore, Defendant testified that he asked to speak to a lawyer

two or three times.[2] The agents began by asking Defendant about the evening's earlier events. The agents quickly came to the conclusion that Defendant was fibbing and so they placed him back in the holding cell. Mansfield estimated that he and Carroll talked to Defendant for about 15 minutes. The agents then questioned his brother, who immediately invoked his right to counsel.

Thirty to forty minutes after Defendant waived his *Miranda* rights, Trevino, who had returned to the Hammond Police Department, began to interview Defendant. Trevino showed Defendant the *Miranda* waiver form that he had previously initialed and signed, and asked him if he understood the rights that were read to him earlier. Defendants answered yes, and Trevino proceeded to interrogate him; Defendant then made incriminating statements. According to Trevino, Defendant did not ask for a phone call or a lawyer.

Defendant Edwards, during his testimony, described his complexion as medium, whereas his sister, for example, was dark-complexioned. He also testified that his hair was real short, not curly, and shaved close to his head at the time of the arrest. The government, however, provided his arrest photograph in rebuttal, which showed that Defendant's hair was not shaved close to his head, but rather showed it as being short and curly. In his affidavit, Defendant denied knowing anyone named David Beagle, but this was not raised during Defendant's live testimony.

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[2] Defendant provided an affidavit to the Court. He did not state in his affidavit that he had asked for a lawyer during his interview

II. DISCUSSION

Defendant raises two claims in his Motion to Suppress. First, he argues that the agents did not have probable cause to arrest him because the informant was unreliable and the agents failed to corroborate the informant's allegations. Second, Defendant asserts that he did not knowingly and voluntarily waive his *Miranda* rights. The Court will address each claim in turn.

A. Probable Cause for Arrest

In order to make an arrest without a warrant, the police must have probable cause to reasonably believe that a particular individual has committed a crime. *United States v. Oliva*, 385 F.3d 1111, 1114 (7th Cir. 2004). To determine whether or not probable cause for a search or arrest existed, we must review the totality of the circumstances to determine "whether, given all of the circumstances set forth . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). This determination is a practical and common-sense inquiry. *United States v. Huebner*, 356 F.3d 807, 813 (7th Cir. 2004). It involves asking whether the officer was acting on reasonably trustworthy information suggesting that the suspect was committing an offense. *United States v. Navarro*, 90 F.3d 1245, 1254 (7th Cir. 1996).

Probable cause may be based on information given by an informant provided that the informant is reliable. *United States v. Rosario*, 234 F.3d 347, 350-51 (7th Cir. 2000). "Reliability may be shown by the informant's past record of reliability, through independent confirmation or personal observation by the police, or by other methods." *United States v.*

Gilbert, 45 F.3d 1163, 1166 (7th Cir. 1995). To determine whether probable cause exists, both with respect to the informant's veracity and reliability and as a basis for the information and with respect to the degree it has been corroborated, we must consider the totality of circumstances. *Edwards v. Cabrera*, 58 F.3d 290, 293 (7th Cir. 1995).

Here, Beagle (the informant) provided several details to law enforcement, all of which were confirmed by agents who personally observed Defendant's behavior. First, Beagle set up the drug deal over the phone in the agents' presence. Beagle stated that his supplier was a heavy-set, black man with a dark complexion and short, curly hair who drove a dark-colored Cadillac. Defendant arrived at the scene of the drug transaction meeting that description: he was a heavy-set, black man who had short, curly hair and was driving a dark-colored Cadillac. The photograph taken during his booking also depicted Defendant as a heavy-set black man with short, curly hair — despite his testimony to the contrary.

Second, Beagle told the agents that the source usually parked in the alley behind his house when delivering the drugs. As expected by the agents, Defendant, who fit the source's description, parked his dark-colored Cadillac in the alley behind Beagle's garage.

Third, the timing of the arrival of the Cadillac fit into the time frame established by Beagle's telephone conversations with his source. Beagle had told the agents that he sometimes needed to call Willie more than once but that generally he showed up within thirty to sixty minutes. Sure enough, Beagle called Willie around 4:00 pm, waited for about 15-20 minutes, called again, and was told that Willie would arrive

within the next 15 minutes. Defendant then showed up in the alley 15 minutes later.

Next, Beagle told the agents that, in the past, Willie would leave and drive around the block if Beagle took too long to meet Willie in the alley. Just as Beagle predicted, Trevino saw the Cadillac begin to pull out of the alley after it had been parked for a couple minutes.

Finally, Beagle received a phone call from Willie, who told Beagle that he was waiting in the alley. Beagle previously had told the agents that Willie typically called Beagle when he had pulled into the alley for the drug delivery. This phone call took place just after Defendant's Cadillac pulled into the alley.

Beagle not only described an individual that looked like Defendant but also predicted Defendant's future behavior. *See Huebner*, 356 F.3d at 814 ("Insofar as [Defendant's] actions mirrored [informant's] prediction of this event, it became clear that [informant] indeed possessed 'inside information,' further establishing his reliability."); *cf. Alabama v. White*, 496 U.S. 325, 332 (1990) (permitting use of anonymous telephone tip where "significant aspects of the caller's predictions were verified"). Based on all the corroborating personal observations of the agents, Beagle's information was reliable, and, when looking at the facts and circumstances known to the agents, they plainly had probable cause to arrest Defendant. *See Rosario*, 234 F.3d at 351 (holding that untested informant was reliable where agents were able to corroborate information provided by informant prior to arrest and search of defendant). All that is required is "'a probability, not a prima facie showing, of criminal activity" . . . to establish probable cause, and that standard is met here." *Id.* (citing *Gates*, 462 U.S. at 235).

Defendant make several arguments in support of his motion to suppress. First, he claims that an uncorroborated allegation of an informant is insufficient to establish probable cause. But as seen above, Beagle's allegations were confirmed by the agents' personal observations. *See United States v. Ganser*, 315 F.3d 839, 843 (7th Cir. 2003) ("If an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity.") (citation and internal quotations omitted).

Defendant also makes much of the fact that the way Beagle obtained his drugs in the initial buys (which resulted in Beagle's arrest) was different than the way he told the agents he obtained drugs when he was cooperating. But Trevino explained that the earlier drug sales by Beagle were months before his July 13 cooperation and involved a different commodity — the earlier source sold only powder cocaine, while Beagle arranged to buy crack cocaine from Willie. Furthermore, Beagle told Trevino that Beagle had begun dealing with other sources since November 2005. The agent's explanation for the reasons for the distinctions in purchasing is credible, particularly in light of the police corroboration of Beagle's specific information regarding his current source.

Second, Defendant asserts that he and his brother were not doing anything illegal when the officers stopped and arrested them — they were simply parked in the alley and then began to drive away. The agents needed to "reasonably believe, in light of the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense." *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir. 2005) (citation omitted).

After observing that Defendant's behavior conformed exactly to what Beagle had forecasted, the agents had reasonable belief that Defendant was supplying drugs to Beagle, their informant. *See Huebner*, 356 F.3d at 814-815 (noting that "'seemingly innocent activity' was properly deemed suspicious by the observing officers" in light of the informant's tip"); *Navarro*, 90 F.3d at 1254 ("actual evidence of narcotics is not required in a probable cause determination.").

Next, Defendant relies heavily on case law regarding the reliability of anonymous tipsters but those cases are simply not on point. Beagle was *not* anonymous. The agents knew exactly who he was — a known cocaine street dealer who obtained his drugs from some source. The information from the known informant was appropriately confirmed by the agents, and not similar to situations where anonymous callers provide unverifiable information.[3] *See Gilbert*, 45 F.3d at 1167 ("The mere fact [the informant] had made a deal with the police does not undermine his reliability, especially in light of [the police officer's] confirmation of the information and the fact that [the informant] implicated himself as well as [the defendant] in the prior burglaries.").

Finally, Defendant claims that Trevino could not have seen the driver of the Cadillac because he did not see the driver use a cell phone. Therefore, the

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[3] Defendant also alleges that the "cell phone number Beagle provided to the agents for Willie[] was not the cell phone number for Mr Edwards's cell phone" (Def. Supp. Mem at 3.) Probable cause is assessed at the moment of the arrest, not based on what officers later may learn *See Tangwell v. Stuckey*, 135 F.3d 510, 517-19 (7th Cir 1998). In any event, this is simply another fact that goes into the calculus, and it's not a particularly persuasive one at that inasmuch as several cell phones were found in the car

argument goes, Trevino would not have had a chance to match Willie with Beagle's description. Simply because Trevino did not see Defendant use a cell phone does not mean that Trevino did not actually see Defendant.

Defendant may have called Beagle as he entered the alley. Notably, Trevino admits that he did not see the Cadillac pull in the alley; rather, he only saw the car park behind Beagle's garage. It is completely reasonable that Defendant made the phone call to Beagle as he entered the alley but before he came into Trevino's line of sight. We therefore don't find the fact that Trevino did not see Defendant using a cell phone persuasive.

In sum, the probable cause in this case is nearly overwhelming. The agents prudently determined that Defendant was committing an offense in their presence, and his arrest was proper.

B. Waiver of *Miranda* Rights

Defendant has taken a scattershot approach in challenging the waiver of his *Miranda* rights. None of his arguments has any merit. Defendant first claims that he was not given his *Miranda* rights before the interview began. He complains that the agents asked several questions seeking biographical information prior to reviewing the waiver form. But these types of questions — which have come to be known as "booking questions," *see Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990) — can be asked notwithstanding *Miranda*. This is because they are not likely to elicit an incriminating response from the suspect, and therefore they are not considered "interrogation." *See United States v. Johnson*, 415 F.3d 728, 731 (7th Cir. 2005). Thus, questions regarding Defendant's name, address, social security number, and date of birth are not

questions seeking an incriminating response. Accordingly, the agents need not have advised Defendant of his *Miranda* rights before obtaining this type of biographical information. *See United States v. Westbrook,* 125 F.3d 996, 1002-03 (7th Cir. 1997); *United States v. Reyes,* 225 F.3d 71, 76-77 (1st Cir. 2000); *United States v. Foster,* 227 F.3d 1096, 1103 (9th Cir. 2000).

Defendant next argues that his statements made to the agents "were the product of the coercive environment of the police station, fear for the well-being of his brother, and concern about his own vulnerability to law enforcement based upon how they had treated him up until the time of questioning." (Def. Mot. at 4.) He points to several factors that contributed to his coercive environment: (1) he had never had such an encounter with law enforcement officials, specifically, the way he was arrested, and that frightened him; (2) no one told him why he was being arrested or where he was being taken, and was nervous because he didn't understand what was going on; and (3) he was denied a phone call to his family, and was worried that his family didn't know his or his brother's whereabouts. Thus, Defendant claims that he was psychologically intimidated into signing the waiver form without understanding it. Defendant also claims that the agents' narration of their time estimates from the arrest to Defendant's interview with Trevino leaves an hour unaccounted for, thus demonstrating that the form was not signed until some time after Defendant was questioned.

A defendant may waive his entitlement to the rights articulated in *Miranda* provided the waiver is made voluntarily, knowingly, and intelligently. *See Edwards v. Arizona,* 451 U.S. 477, 482 (1981). We assess this question in light of the totality of the

circumstances. *Sweeney v. Carter,* 361 F.3d 327, 331 (7th Cir. 2004). Courts typically consider, among other factors, the defendant's background and conduct, his mental and physical condition, the duration and conditions of the detention, the attitude of the police, and whether the police utilized physical or psychological coercion. *United States v. Jackson,* 300 F.3d 740, 748 (7th Cir. 2002). "We analyze coercion from the perspective of a reasonable person in the position of the suspect." *United States v. Spruill,* 296 F.3d 580, 589 (7th Cir. 2002).

Based upon the totality of the circumstances, the Court finds that Defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. The record does not reflect that he was subjected to a prolonged detention or lengthy questioning. Furthermore, Defendant presented no evidence that his background or mental or physical condition would affect his ability to voluntarily and knowingly waive *Miranda* rights. Merely because Defendant was nervous and scared by the situation he put himself in — after all, he was under arrest — did not result in a coercive environment. *See Navarro,* 90 F.3d at 1258 (affirming district court's finding that atmosphere during interview was not coercive and that defendant's nervousness during interview did not lead to involuntary waiver); *United States v. Duran,* 957 F.2d 499, 502-03 (7th Cir. 1992). Moreover, the fact that the agents may have used some force in effectuating Defendant's arrest does not inevitably lead to a finding of involuntary waiver. *See Watson v. Detella,* 122 F.3d 450, 454 (7th Cir. 1997) (finding that *Miranda* waiver was voluntary even though Defendant was injured during arrest). When it most mattered — right before the interrogation — Defendant has not presented a shred of evidence that he was physically or

psychologically threatened or abused into signing the waiver form.

Also, the Court does not find the "missing hour" argument compelling. Lapses in memory can easily account for the discrepancy. What the Court does find persuasive is that Defendant spent only a few hours in custody (and was not continuously interrogated during this time) before his inculpatory interview with Trevino began. *See United States v. Doe,* 149 F.3d 634, 639 (7th Cir. 1998) (two hours of questioning handcuffed in the back of police car in remote location not sufficient to find waiver involuntary).

Most importantly, we note that Defendant signed and initialed a written consent form waiving his *Miranda* rights. We believe Mansfield's testimony that his colleague Carroll read through the document, asked Defendant also to read it, and asked Defendant to initial each right and the waiver if he understood them. Defendant never posed any questions about his rights or the waiver to the agents, or told the agents that he didn't understand his rights. This signed waiver form, under these circumstances, factors heavily in fording that Defendant understood and knowingly and voluntarily waived his *Miranda* rights.

Finally, Defendant highlights that Trevino did not review the waiver form again but rather simply showed the form to Defendant and asked him whether he remembered and understood the rights that had been read to him about a half an hour before. Defendant answered yes. Nothing more is needed. *See Baskin v. Clark,* 956 F.2d 142, 146 (7th Cir. 1992) (finding that a lapse of half an hour between reading the *Miranda* waiver and the inculpatory statement does not result in an involuntary waiver), *United States v. Diaz,* 814 F.2d 454, 460 n.6 (7th Cir. 1987)

(statement did not violate *Miranda* where the defendant was advised of his rights "several hours earlier."). Indeed, Defendant received a second opportunity to inform the government that he wished to invoke his *Miranda* rights or that he didn't understand them. He failed to do either.

Defendant's third claim is that he invoked his right to counsel two or three times during his interview. Both Mansfield and Trevino testified that Defendant never asked for counsel. To decide this swearing contest, the Court must make a credibility determination. We credit the testimony of the two agents over Defendant. Mansfield testified that if Defendant had requested an attorney, the agents would have stopped the interview. The Court believes this testimony as the agents did exactly that when Defendant's brother invoked his right to counsel. Furthermore, we find Defendant's testimony generally less credible as his booking photograph directly contradicted his description, under oath, of himself. Accordingly, we accept the agent's testimony that Defendant never invoked his right to counsel.

III. CONCLUSION

For the above reasons, Defendant's Motion to Suppress [DE 22] is **DENIED.**

SO ORDERED.

ENTERED: February 14, 2007

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT